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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CALVIN BURNEY

and

MITCHELL BURNEY,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

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QUESTIONS PRESENTED

I

WHETHER DUE PROCESS IS DENIED WHEN A REVIEWING COURT, DESPITE THE LACK OF ANY FACTUAL FINDINGS AND INDEED WITHOUT THE BENEFIT OF ANY FACTUAL BASIS FOR DOING SO, ARBITRARILY IMPUTES A WAIVER OF THE CONSTITUTIONAL RIGHT TO SPEEDY-TRIAL TO THE ACCUSED.

II

WHETHER DUE PROCESS IS DENIED WHERE ISSUES LITIGATED AND RESOLVED AT THE TRIAL LEVEL (IN THE WAKE OF VERY SPECIFIC CONTENDING THEORIES) ARE RESOLVED BY THE APPEALS COURT AGAINST THE ACCUSED ON THE BASIS OF A THEORY (1) THAT WAS NOT FACTUALLY DEVELOPED BY THE PARTIES AT THE TRIAL LEVEL; (2) THAT WAS NOT ARGUED BY THE PARTIES AT THE TRIAL LEVEL; (3) THAT WAS NOT BRIEFED OR ARGUED BY THE PARTIES ON APPEAL AND (4) THAT WAS, IN ANY EVENT, A THEORY THAT MORE PROBABLE THAN NOT WAS NOT EVEN SUSPECTED BY THE TRIAL JUDGE.

III

WHERE THERE IS SOME EVIDENCE SUFFICIENT TO RAISE AN AFFIRMATIVE DEFENSE, THE TRIAL COURT MUST SUBMIT THE ISSUE AS TO WHETHER THE DEFENSE WAS MAINTAINED TO THE JURY.

IV

WHETHER ONE'S CONVICTION (HERE MITCHELL BURNEY'S) ALONG WITH THAT OF HIS CO-DEFENDANT FOR CARRYING THE SAME CONCEALED WEAPON IS SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE PROOF ONLY SHOWS HIS MERE PRESENCE IN THE CAR WHERE THE GUN WAS FOUND.

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioners, Calvin Burney

and Mitchell Burney, respectfully pray that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on November 13, 1991 (Calvin Burney) and December 18, 1991 (Mitchell Burney), when the Supreme Court of Ohio denied further appellate review. See Appendices "A" and "C", infra, pp. A-1 and A-17.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Fifth Amendment, United States Constitution;

(2) Sixth Amendment, United States Constitution;

(3) Revised Code of Ohio, §2923.12(C)(1);

(4) Revised Code of Ohio,

§2925.03(A)(7);

(5) Revised Code of Ohio, §2945.71(C);

(6) Revised Code of Ohio, §2945.72.

OPINIONS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendix "A" (Calvin Burney) and Appendix "C" (Mitchell Burney) in the Appendix to this Petition, at pages A-1 and A-27.

The Journal Entries of the Ohio Court of Appeals, the judgments to which the petition is directed, are designated Appendix "B", (**Calvin Burney**) at page A-2 and Appendix "D", (**Mitchell Burney**) at page A-28.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court

of Ohio in the case of **State v. Calvin Burney** was entered on November 13, 1991. The judgment of the Supreme Court of Ohio in the case of **State v. Mitchell Burney** was entered on December 18, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257(3).

STATEMENT OF THE CASE[1]

Calvin Burney and Mitchell Burney, the petitioners in this cause, are brothers. They were jointly indicted, tried and convicted in the Common Pleas Court in and for Cuyahoga County, Ohio. Both were represented by the same attorney. On appeal they were represented by different

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[1] References to the transcript of proceedings will be designated by the prefix "Tr." References to the Appendix to this Petition are designated Appendix " ", p. A-___.

attorneys. The convictions of both were affirmed. This petition primarily deals with issues that are common to both of those individuals. Because of the identicality of these issues, the position was taken that the issues were properly joinable in one Petition as allowed by Rule 12(2), Rules of the Supreme Court of the United States.

The facts relevant to a resolution of the central issues raised by the Petitioners in this cause were sufficiently set forth in the two (2) Opinions rendered below in their separate appeals. See **State v. Calvin Burney, No. 58611** (Appendix "B", infra, p. A-2) and **State v. Mitchell Burney, No. 58815** (Appendix "D", infra, p. A-28).

In **State v. Calvin Burney** the Court wrote:

> [Calvin Burney] was initially indicted December 28, 1987 in Cuyahoga County Court of Common Pleas, criminal case number CR-222830, for events which occurred on November 6 and 13, 1987.
>
> Appellant Burney was arraigned on this initial indictment on January 26, 1988. On July 6, 1988, appellant waived his right to speedy trial. A motion to suppress evidence was filed on August 10, 1988, and was heard and overruled on April 4, 1989. Trial scheduled on March 29, 1989 was continued at both parties request until April 19, 1989.
>
> On April 17, 1989, a second indictment was returned by the grand jury. The charges were raised from drug abuse to drug trafficking. On May 4, 1989, appellant entered a "plea in bar" based on denial of a speedy trial. On May 8, 1989, appellant was arraigned.
>
> A jury trial was commenced

> on August 14, 1989. On August 25, 1989, the jury returned a verdict of guilty as to all counts and the gun specification.
>
> On September 14, 1989, the trial court sentenced appellant to serve a term of three years to fifteen years. All terms were to run concurrent.
>
> On October 2, 1989, the initial indictment was dismissed as the result of a nolle prosequi.

State v. Calvin Burney, Appendix "B," infra pp. A-7 to A-9.

In commenting on this identical factual scenario, a different panel of the Court of Appeals (that included, as one of the Judges, the author of the Opinion in the **Calvin Burney** case, quoted from above) wrote that:

> The original indictment was brought against appellant [Mitchell Burney] on December 28, 1987 as a result of the November 6 and 13, 1987 events.

Appellant's arraignment of this indictment occurred on January 26, 1988. Appellant waived his right to a speedy trial on July 6, 1988. On August 10, 1988, a motion to suppress evidence was filed, said motion being heard and overruled by the trial court on April 4, 1989. Both parties thereafter requested that the trial scheduled for March 29, 1989 be continued; whereupon a pretrial was scheduled for April 19, 1989.

The Cuyahoga County Grand Jury returned the second indictment on April 17, 1989 in which the initial drug abuse charges were raised to drug trafficking. On May 4, appellant entered a "plea in bar," seeking a dismissal of the indictment based on denial of a speedy trial. Appellant pled not guilty at his arraignment on May 8, 1989. The trial court subsequently nolled two counts of the indictment.

Trial by jury commenced on August 14, 1989 on the remaining eight counts. The jury returned a verdict of guilty as to these eight counts on August 25, 1989.

State v. Mitchell Burney, Appendix "D", pp. A-33 to A-36.

Of significance here, apart from the clashing calculations on identical facts so evident in both of the **Burney** Opinions are two critical circumstances. One, the issue deemed dispositive and resolved by the Appellate Court, in both Burney appeals, had not even been considered by the parties or the trial Court. Next, the specific speedy-trial issue resolved by the Court of Appeals was not briefed, or even argued orally, by the parties in the Court of Appeals or at the trial level. The reason this is so could not be clearer.

Simply put, the resulting ruling is believed to be a product of an apparent unwillingness to fully

vindicate the rights of these Petitioners because they were charged with serious drug offenses.

This point is well made when one considers that the only issue presented to the trial Court and resolved against the Burneys by the trial Judge had simply asked: whether the rule announced by our Supreme Court in **State v. Adams, 43 Ohio St. 3d 67 (1989)**, applied. The Opinion of the trial Judge, when read in the light of the arguments made, distills into a conclusory determination that the **Adams** rule did not apply. See Appendix "E", infra, p. A-67.

In the Court of Appeals, the State sought to defend the trial Court's ruling which can only be read as an adoption of the argument made by

the State and as a specific rejection of the arguments made by the defense.[2] Again, the only issue addressed by the parties in their Briefs (and for that matter in the oral arguments) dealt with whether the speedy trial waiver, that had admittedly been exercised by these Petitioners with reference to the charges made in their original indictment, could be applied to new, different and more serious charges made in the subsequent indictment.

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[2] Here the Record shows the Court, after listening to the State argue that these Petitioners had waived their speedy trial rights with reference to the new charges as well (Tr., 14-16), summarily declared that he "underst[ood] the arguments on both sides ... underst[ood] the law." And, then proceeded to "over-rule the Motion" to Dismiss (id., at p. A-67 [Tr., p. 18]). Nothing further was said by the Court.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This case, perhaps moreso than any that has ever been presented to the Court, shows clearly what has to be a problem with the way criminal convictions are now being routinely reviewed. For although the two separate resolutions, with which we are here concerned, dealt with the identical speedy-trial issue, the six Appellate Judges who were involved in these two appeals expressed, or joined in, the Opinions that are totally irreconcilable. This fact alone should command the attention of this Court.

In addition, the point should also be made that none of the bases relied on for affirmance were

considered by the parties at the trial level. Indeed, it is also a fact that the sole basis relied on by both panels, for the affirmances, were neither briefed or argued by the parties. Indeed, the basis relied on was not even mentioned to the trial Judge or by the trial Judge.

The ultimate points made in Arguments I and II below are really dispositive of the speedy trial issues in this case. Indeed, the arguments magnify a need for an awareness that regardless of the facts and even the law (in the drug case) reviewing Courts, especially those in Ohio, are simply most willing to look the other way in search of a basis for affirming a conviction.

Indeed, if it were otherwise,

rather than ambush these Petitioners (on the basis of the resolution of an issue that was not confronted by the trial Court or raised by the parties in their arguments), by substituting its own indefensible rationale, the Court should have vindicated the speedy trial rights of these Petitioners. Stated another way, it could not be clearer that the Court of Appeals (in both of the appeals for which review is being sought) simply substituted for the trial court's flawed resolution the ruling they undoubtedly would have made if they had been acting in his stead.

In our judgment, it was neither the function or the prerogative of these Appellate Courts to make the factual findings relied on to resolve

the speedy trial issue against these Petitioners. The fact that this was done outside the issues specifically discussed at the trial level by the parties and the trial Judge (Tr., 14-18) and outside the issues discussed and argued (in the Appellate Briefs) by the parties is bad enough. What makes it worse is that the State Appeals Court did not view the position imputed by it to the State as having been waived. The significance of this circumstance lies in the fact that not unlike Appellate Courts everywhere, Ohio's Appellate Courts have never hesitated to view a position taken by the accused as having been waived if not seasonably raised and resolved at the trial level. See **State v. Gary Johnson**

(II), 46 Ohio St. 3d 96, 545 N.E. 2d 636, at 642 (1989).

ARGUMENT NO. I

DUE PROCESS IS DENIED AN ACCUSED WHEN A REVIEWING COURT, DESPITE THE LACK OF ANY FACTUAL FINDINGS AND INDEED WITHOUT THE BENEFIT OF ANY FACTUAL BASIS FOR DOING SO, ARBITRARILY IMPUTES A WAIVER OF THE RIGHT TO SPEEDY-TRIAL TO AN ACCUSED.

In **Calvin Burney** the Court of Appeals recognized that in the second indictment returned in this case "the charges [... had been] raised from drug abuse [a fourth degree felony] to drug trafficking (Appendix "B", p. A-8). Similarly in **Mitchell Burney** the Court again, and likewise, recognized that "the charges were raised from drug abuse (a fourth degree felony) to

drug trafficking" (Appendix "D", p. A-34).

Postured by the fact that indeed the charges added in this second indictment were far and away more serious charges than those charges made in the earlier indictment, the petitioners in an appropriate Motion took the very specific position that this situation was controlled by **Adams**. This position was that the speedy trial waiver applicable to the original indictment could not, in the wake of **State v. Adams**, be imputed to the subsequent indictment. Since the Appellate Court, in both of these appeals agreed **State v. Adams** applied, that should have ended the matter. But such was not to be. As the Court in both instances proceeded to do just

what they concluded **State v. Adams** barred them from doing.

Here, it is worth repeating, the trial Court in denying petitioners' speedy-trial challenge made absolutely no findings of fact. Indeed absolutely nothing was said by the trial Court that can even be suggested as forming a basis for imputing to the trial Judge the factual findings required to support the calculations made in the Appellate Court's Opinions.[3]

The significance of the absence of findings is evident from a reading

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[3] Granted as shown above Ante, pp. 6-7 & 7-8, the separate panels, of the Court of Appeals, could not come up with the same final figures. However, both panels did agree that more than six hundred (600) days elapsed between the original indictment and the trial.

of the Concurring Opinion in **Mitchell Burney**, Appendix "D", infra, p. A-58. In this Opinion, Judge Spellacy, undoubtedly recognized the impact of the fact credited by his colleagues (and the Court itself in Calvin Burney) that the "speedy trial waiver[s] exercised [by Mitchell Burney] as to his initial indictment does not apply to the latter indictment pursuant to **State v. Adams, 43 Ohio St. 3d 67**" Ibid. Simply put, this Judge was obviously of the opinion that these convictions really should be reversed unless another basis for affirmance existed. Thus he reached the conclusion that **Adams** did not apply -- a conclusion that is clearly at odds with the position taken by five of his colleagues on the

Court of Appeals.

Having said that it is of significance to note that in **Calvin Burney** the Court of Appeals in addressing the specific issues before it (as framed by the trial Judge's ruling and the parties both at the trial level and in the appellate Court) fully endorsed the position taken by the Petitioner, Calvin Burney. In its ruling on this specific point, which can only be viewed as an outright rejection of the positions taken by the trial Court on this issue and by counsel opposite (both, at the trial level and on appeal), the Court in clear and unambiguous language wrote that:

> [A]pplying the [Ohio Supreme Court's] logic to the Speedy trial waiver, herein, the original waiver does not

apply to the subsequent re-indictment charges.

State v. Calvin Burney, Opinion, Appendix "A", infra at p. 6. This very precise ruling was then adopted without reservation by the majority in the **Mitchell Burney** Opinion. There the Opinion, in language that rather compellingly articulates formidable support for our thesis, stated:

> The Sixth Amendment to the United States Constitution guarantees a defendant a right to a speedy trial. Section 10, Article I of the Ohio Constitution provides a similar provision.
>
> A defendant's right to a speedy trial is codified in R.C. [of Ohio, §] 2945.71. This statute was enacted as:
>
> > "'*** a rational effort to enforce the constitutional right to a public speedy trial of an accused ... and shall be strictly

> enforced by the courts of this state.'"

State v. Packay (1980), 64 Ohio St. 2d 218, syllabus.

* * *

The Ohio Supreme Court in State v. Adams, supra, addressed the issue of whether a defendant's waiver of his right to a speedy trial as to an initial charge acts as a waiver of that same right to a subsequent charge. The court held that:

> "'*** when an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver."

State v. Mitchell Burney, Appendix "D", pp. A-37, to A-38. (Emphasis

supplied.)

The fact that the Court in **Mitchell Burney** specifically cited the **Calvin Burney** Opinion (id., at A-40) mightily punctuates the position being urged by these Petitioners. Actually, it does even more than that. For what is shown is not merely a frightening unwillingness to follow the force of the only conclusion that could possibly have resulted from the premises relied on (doubtless because this was a serious drug case), the Court simply reached out and artificially created, out of whole cloth, a reason to avoid reversing a drug conviction. The fear here has to be that of being regarded as having committed some sort of treason -- i.e., that is by giving aid and

comfort to the enemy in the war on Drugs.

In overcoming **Adams** it is significant to note, as shown above, the separate panels came up with a literal hodge-podge of calculations. See ante, pp. 6-8. At most these calculations can only be said to have been the ones the particular Judges would have made if they had been the fact finder.[4] But, of course, by law that task is given to those who function at the trial level -- in this instance it was the trial judge. On the other hand, while clearly the calculations cannot be reconciled, the critical fact here is they were made

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[4] What makes these calculations even more farcical, if not hilarious, is that one of the Judges agreed with both calculations.

without any input by the parties. Still the grim fact remains (as argued below) that once the Court agreed the waivers executed by the Burneys could not apply to the new charges, that should have ended the speedy-trial discussion in their favor.

Now counsel opposite (in his response papers) will not even attempt to explain how our Court of Appeals could jump from the categorical conclusion that the waivers executed as against the original charges could not be applied to the subsequent charges to the conclusion that calculations which related to the tolling of the original speedy-trial clock (that ran on the original charges) could be made in spite of this ruling to apply full strength to

the new charges made in the subsequent indictment.

In our judgment, any failure on the State to address this issue should be viewed as a cop-out -- pure and simple. The efficacy of this point will be magnified for the Court, if as occurred at the Ohio Supreme Court level where further appellate review was sought, counsel opposite did not even credit the existence of **State v. Adams**.

ARGUMENT NO. II

WHERE ISSUES ARE LITIGATED AND RESOLVED AT THE TRIAL LEVEL IN THE WAKE OF VERY SPECIFIC, CONTENDING THEORIES (WHICH THEORIES WERE THE ONLY ONES BRIEFED AND ARGUED BY THE PARTIES IN THE APPEAL), DUE PROCESS IS DENIED WHEN THE APPELLATE COURT RESOLVES THE

APPEAL AGAINST THE ACCUSED ON THE BASIS OF A THEORY (1) THAT WAS NOT FACTUALLY DEVELOPED BY THE PARTIES AT THE TRIAL LEVEL; (2) THAT WAS NOT ARGUED BY THE PARTIES AT THE TRIAL LEVEL; (3) THAT WAS NOT BRIEFED OR ARGUED BY THE PARTIES ON APPEAL AND (4) THAT WAS, IN ANY EVENT, A THEORY THAT MORE PROBABLE THAN NOT WAS NOT EVEN SUSPECTED BY THE TRIAL JUDGE.

Here it should be emphasized the State only contended, at the trial level, that because the defense had a sufficient awareness of the additional charges that were made in the second indictment this fact put the State's filing of the additional charges outside the ambit of **State v. Adams, 43 Ohio St. 3d 67 (1989).**

In the appeal taken by Calvin

Burney, one of the petitioners herein, the precise argument made by counsel opposite, which resulted in the trial court's summary denial of the Motion to Dismiss, was that:

> We are next confronted with the fact that the appellant was treating both cases as the same case during the period of time prior to and up to the time of trial in CR 238069.
>
> First, the bond in CR 222830 was applied to CR 238069. Second, Appellant's [trial] counsel moved the court prior to trial to incorporate the motion to suppress evidence filed in CR 222830 into the proceedings in CR 238069. (T. 28-29). Third, Appellant's [trial] counsel was satisfied with the discovery response provided by the state in CR 222830 and agreed that it be incorporated into the proceedings in CR 238069. (T. 32-33). This point is especially important in light of the Adams decision offered by appellant.

See, Answer Brief, filed by the State in **State v. Calvin Burney**, Case No. 58611, at pp. 11-12.

Here it should be noted that in the appeal of Mitchell Burney, the other petitioner herein, the State made virtually the same non-sensical argument. Specifically it was said in that appeal:

> The record reflects that the State's discovery response and Bill of Particulars in CR 222830 was filed on March 16, 1988. Appellant's waiver of speedy trial occurred afterwards on July 6, 1988. **By accepting the discovery as being complete in CR 238069 as it was provided in CR 222830**, the appellant was indicating that he was in fact fully apprised and informed of the waiver of speedy trial. Appellant always knew the essential facts of the State's case based upon the events of November 6th and 13th, 1987, and that never changed.

Answer Brief, filed by the State in **State v. Mitchell Burney**, Court of Appeals No. 58815, at p. 12.

Postured then by these considerations it should suffice to simply note the elementary rule of appellate practice that a reviewing court will not alter the theory under which facts are developed and issues are resolved at the trial level. Having said that, it is here being submitted that the Appellate Court's recitation of the facts is quite sufficient to make our point. Here the Court wrote:

> ... a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the nature of the crime he is charged with.

Opinion, Appendix "B", p. A-9.

(Citing **Adams**, at 70.) The point here being that having reached this correct conclusion, the Court of Appeals then simply conjured up a completely indefensible rationale to justify failing to address the issues as framed by the parties. The Court then proceeded to affirm the conviction on theories that, in addition to being invalid and untenable, were simply not addressed by the parties.

Next, we submit it is most unfair for the reviewing court to have considered and resolved these appeals on the basis of issues that were not considered by the parties or the trial Court. See, **United States v. Check, 582 F.2d 668, at 683 (2d Cir. 1978).** On this point consider the rather sagacious remarks made by Justice

Cardoza in **Shepard v. United States, 290 U.S. 96, 102-103 (1933)**. There it was said, for the unanimous Court (in a case that really focuses on an aspect of the false rationale our Appeals Court would impute to our trial Judge), that a "trial becomes unfair if facts developed at a trial are used by an appellate court for different purposes, purposes that arguably were unavowed and unsuspected." Id., at 102-103. Also see **United States v. Hannah, 584 F.2d 27 (3d Cir. 1978)**, where the Third Circuit, while considering an appeal by the Government, took the position that:

> An appellate court may properly review a criminal case only on the theory submitted to the jury at trial by the prosecution.

Id., at 32.

All this seems to verify the ultimate position taken in the **Check** decision, and contended for here, that there "is venerable precedent" that calls for disregarding the unseasonable advancement of alternative theories to salvage a conviction. Clearly this occurs when the grounds advanced by the parties in the trial, or even on appeal, differ markedly, as they did here, from those relied upon by the appellate court. Cf., **United States v. Check, 582 F.2d 668, 681 (2d Cir. 1978).**

This cause then furnishes the Court an apt opportunity to re-invigorate the principle that forecloses any appellate use of Shepard-type, post hoc, justifications

or rationales and prevent them from not only being used by the parties, but from being used (as was done here) by appellate courts to literally ambush those who seek to appeal their convictions. Simply put, this Court should fully and unequivocally credit, endorse and ratify this "venerable precedent" that bars Appellate Courts from creating facts to support theories not even considered in the lower courts. And, most assuredly were not relied on by such courts.

In our judgment, this Court should conclude that inasmuch as the prosecution's trial court contentions were expressly adopted by the trial Judge, the reviewing court was required to resolve the appeal on the basis of the challenge leveled against

that ruling. If not, then at the very least the Court should not have proceeded to resolve the appeal on the basis of factual findings that were not made at the trial level. This is particularly so where no notice is given to the parties that the Court intended to disregard the arguments made by the parties.

In our judgment, a repeat of the failure on the State to address the issues as framed by the parties should be viewed as a cop-out -- pure and simple. The efficacy of this point will be magnified for this Court, if as occurred at the Ohio Supreme Court level, counsel opposite fails to explain why **State v. Adams** does not control this situation. This we contend is significant since his

position at the trial level and in the Court of Appeals was that **Adams** simply did not apply. In our judgment, with that position having been rejected on appeal in our favor, it is not surprising that the State has really taken a wait and see attitude.

Distilled, what we are contending in this segment of the petition is that due process was denied when the reviewing court totally disregarded the dispositive contentions made to and resolved by the trial court, which contentions were the only ones argued and briefed on appeal by the parties. It is also being contended that due process was violated when the court summarily resolved these appeals on the basis of the court's own factual determinations that were made without

any input from the parties.

In further emphasizing the points we are here contending for, it is significant that in his concurring Opinion in **State v. Mitchell Burney**, Appendix "D", infra, at p. A-58 through A-59, Judge Spellacy (doubtless because the flaw in the majority's ultimate rationale was immediately apparent to him) chose to distance himself from the majority's holding that **Adams**[5] did indeed apply to the additional charges made in the second indictment.

The bottom line then is that

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[5] The State's position in the **Mitchell Burney** appeal distilled into a serious opposition to what was regarded as Mitchell Burney's "assertion that **State v. Adams** is controlling". Brief of Appellee, filed in **State v. Mitchell Burney**, at p. 13.

obviously this case does not present the speedy-trial issue wrapped in a very neat package. Indeed, although we fully endorse the Appellate Court's conclusion that **State v. Adams** applied to bar these petitioners from being deemed to have waived their speedy trial rights, we seriously contest the ultimate resolution made by that Court on this issue. In our judgment, the positions taken by the Court of Appeals as to both of these petitioners is really indefensible. Here we repeat the point made in **United States v. Hannah, 584 F.2d 27 (3d Cir. 1978)**, when the Court ruled that:

> An appellate Court may properly review a Court case only on the theory submitted to the jury at trial by the prosecution.

Id., at 32.

Clearly under **Hannah** the fact that the State in our case contended at the trial, and likewise in the Court of Appeals, that **State v. Adams** did not apply to the speedy-trial issue in this case is most significant. See Tr., pp. 14-16.

ARGUMENT NO. III

WHERE THERE IS SOME EVIDENCE SUFFICIENT TO RAISE AN AFFIRMATIVE DEFENSE, THE TRIAL COURT'S OBLIGATION IS TO SUBMIT THE ISSUE TO THE JURY.

The point here that should be emphasized is that it is only where there is no evidence to support a particular defense that a failure to instruct the jury thereon can be justified. With this as a given the Appellate Court's conclusion that even

if, as petitioner Calvin Burney testified, he had the "pistol for the opening and closing of his lawful fish store business" (Opinion, Appendix "B," at p. A-23), this fact could not be used "to justify his gun possession in the middle of the afternoon miles away from his store" (ibid), becomes still another major flaw in the trial that led to the conviction of Calvin Burney.

Here we start by noting that a jury is simply not bound to follow what appears to Judges to be simple logic. This being so, the fact that the petitioner, Calvin Burney (with reference to this issue) sought, as was his right, to have his guilt determined, not by members of the government but rather by his peers, is

a matter of considerable importance here. This fundamental right is particularly important in drug cases where it is obvious the judiciary (nationwide) has been elicited to do more than its share in the "war on drugs". Indeed, Courts are now being asked to actually dilute rights that were once held to be sacred and inviolate. The real tragedy in all this is yet to come. For it is our belief that there are no rights that are beyond the power of our Courts to destroy in the name of law and order.

In any event, it should be emphasized that the asserted justification for the trial court's refusal to give the requested

instruction[6] was simply imputed to him by the Court of Appeals. The fact that this was done in a manner that does not accommodate the position taken by the trial court (Tr., 831) or the parties in their Briefs, is not merely a part of the problem, it is **the** problem.

Here it seems clear the issue was postured for the Court of Appeals by the appellant's request for the instruction, which was specific enough (Tr., 831-836). The State's insubstantial position, in the Court

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[6] Of no mean significance here, whatever the reason was for the trial court's disinclination to give the requested instruction certainly was not for the reasons asserted by the Court of Appeals. In any event, even if it had been the basis for the trial court's refusal, as shown in this argument it would have been insufficient.

of Appeals, was that there was "no justification offered by the Appellant as to why he was armed ... on his way to ... [a supplier].... [N]o testimony of other merchants being robbed in that neighborhood; in sum, no justification as to why a prudent person in the appellant's position as a business owner would go armed at that time and place." (Answer Brief, filed in The Court of Appeals, at p. 17.)

Obviously the position taken by the Court of Appeals cannot be defended. And, just as surely it is a fact that the issue rightly should have been submitted to the jury.

The upshot of the contentions made as to this issue is that if indeed the gun was lawfully possessed,

then the effect of such a determination on the jury's verdict simply cannot be calculated. Also we can credit the fact that if nothing else, it seems clear enough the jurors' questions concerning the gun would have been far more difficult to resolve if the requested instruction had been given. (See Tr., pp. 936, et. seq.)

In summary then, what is being contended here is that the trial court's failure to instruct the jury on the special, stability defense relative to this petitioner's possession of the gun translates into a due process violation. This follows because there is really no way to characterize the unavoidable effect of this omission from the charges

actually given except to agree that this failure translates into the Court having directed a verdict against this petitioner on this issue. See **Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967).**

Clearly then, if Calvin Burney was entitled to the charge requested, he was surely shortchanged by the trial court's failure to do so. So postured, it would then follow, as we contend, there was a due process failure in his conviction. This same failure again surfaced in the Appellate Court's Opinion, which validated these convictions and sought to justify its various positions by resort to false reasoning patterns.

ARGUMENT NO. IV

One's Conviction Along With A Co-Defendant For Carrying A Concealed Weapon, Where There Is Only One Gun Involved, Is Not Supported By Sufficient Evidence Unless The Proof Shows More Than The Mere Presence Of The Gun In The Car In Which Both Were Occupants.

The issue as to petitioner, Mitchell Burney's, guilt on the weapons charge in the first instance was thoroughly intertwisted with the defense put forth by his co-defendant at the trial, Calvin Burney (the other petitioner here). Calvin Burney's defense was, as shown and argued above, that his possession of the gun was lawful. Indeed it was, if his proof established the defense provided

by R.C. of Ohio, §2923.12(c)(1).

Since the Court refused to instruct the jury on that issue, the defense was not properly presented to the jury. In any event, if the petitioner was entitled to any benefits that may have inured to him from such a charge, then to the extent the instruction should have been given he was denied due process.

Given the fact that Mitchell Burney testified he was unaware of the presence of the gun in the car, and Calvin admitted the gun was in his exclusive possession, and that he was justified in having the gun for his protection, the issue clearly is one that cannot be resolved on the basis used by the Courts below.

It is for this reason that our

cause should be reviewed in its entirety by the Court. And, this to the end that the petitioners' guilt can be determined in the light of fundamental criteria.

CONCLUSION

The critical speedy-trial issue in this effort to appeal turns on the fact that the Sixth Amendment to the United States Constitution provides the ultimate right that must be accommodated in any resolution. This idea was well stated by the Ohio Supreme Court in **State v. Adams, 43 Ohio St. 3d 67 (1989).** There our Supreme Court recognized that while this Supreme Court had not fixed the "mandatory time periods within which the State must bring an accused to trial, 'the States ... are free to

prescribe a reasonable period consistent with constitutional standards'...." Id., at 68, citing **Barker v. Wingo, 407 U.S. 514, at 523.**

Utilizing this holding from **Barker v. Wingo**, as a premise for what we deem to be the dispositive ruling in our case as well, the Ohio Supreme Court then held that the provisions of R.C. of Ohio, §2945.71 (which implemented the speedy trial rights of those accused of felony crimes in this State) "are mandatory and must be strictly complied with" (ibid).

This being so, the date of the arrest (i.e., November 13, 1987) triggered these petitioners' speedy-trial rights as to those charges that were first made in the second indictment -- the one on which these

petitioners were ultimately convicted. Thus it could not be clearer that none of the waived time, that delayed the trial of the charges in the first indictment, could be used to stop the speedy-trial clock on the additional charges. Since the clock on these charges started on the day of the arrest, ran unabated until May 4, 1989, when these petitioners filed their Pleas in Bar, the required conclusion here is really inescapable.

The State will again (as it did in defending the Ruling made by the appeals Court) simply ignore the inconfutability of our contention that the fact-dependent findings underpinning the Appellate Court's resolution (of the speedy trial issue) was not even capable of being reliably

determined on the basis of the trial Record. This follows because the Record itself, as it now stands, is simply barren of the facts necessary for any reliable resolutions of the Speedy Trial issues in this appeal.

Given the inconfutability of our analysis of the speedy-trial issue in this cause, it is quite easy to understand the position taken by Judge Spellacy in **Mitchell Burney**. [7] The upshot of this petition is that these convictions can only be validated if

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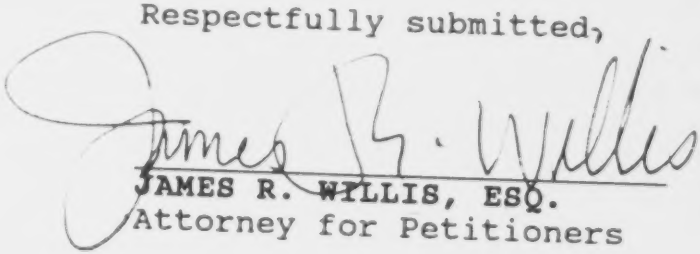
[7] Undoubtedly Judge Spellacy recognized, as this Court surely will, that none of the time properly excluded from the running of the speedy trial clock with reference to the charges in the original indictment could be excluded from the charges made in the second indictment since there additional charges "aros[e] from the same set of circumstances" involved in the original indictment **State v. Adams, 43 Ohio St. 3d, at 69.**

indeed, and in fact, **Adams** is not controlling and the views expressed in both Burney Opinions to the effect that it was applicable are wrong -- dead wrong.

While the speedy-trial issue dominated the arguments made, the other issues discussed are like matters of serious concern to the cause of justice in this case. Hence, should likewise be reviewed and ultimately reversed.

Respectfully submitted,



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